1962

# Bennett Motor Co. v. Mark L. Lyon et al : Brief of Respondent

Utah Supreme Court


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# In the
# Supreme Court of the State of Utah

BENNETT MOTOR COMPANY,
*Plaintiff-Appellant,*
vs.
MARK L. LYON, THE TRAVELERS INSURANCE COMPANY, a corporation,
*Defendants,*
and
UNITED STATES FIDELITY AND GUARANTY COMPANY,
*Defendant-Respondent.*



Case No.
9680

## DEFENDANT-RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, Honorable Marcellus K. Snow, Judge

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## NATURE OF THE CASE

Plaintiff brought this action to recover losses resulting from the destruction of a Ford truck which had been sold by plaintiff under a Conditional Sale Contract to the defendant Mark L. Lyon.

## DISPOSITION IN LOWER COURT

The case was tried to the Court. Defendant Lyon suffered a default judgment and has not appealed. Plaintiff made a settlement in mid-trial with defendant the Travelers Insurance Company and dismissed the action against it. Plaintiff now appeals from a judgment for defendant-respondent, United States Fidelity and Guaranty Company, hereinafter called "U.S.F. & G."

## RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment and judgment in its favor as a matter of law.

## STATEMENT OF FACTS

On or about August 15, 1958, defendant Mark L. Lyon purchased a 1957 Ford Truck from plaintiff under a conditional Sales Contract (Plaintiff's Exhibit No. 1; R. 54). Thereafter, and prior to December, 1959, Lyon obtained insurance coverage on the truck with two different insurance companies which are not parties to this action (R. 55, 108-109). Such coverage was cancelled in each instance for non-payment of premium, and this fact was known to plaintiff (R. 109, 112).

On or about December 16, 1959, defendant Lyon obtained from defendant U.S.F. & G. a policy of insurance, No. C1569348, insuring against "direct and accidental loss of or damage to" the truck (Exhibit No. 2; R. 54) and on January 8, 1960, a loss payable clause, showing plaintiff as lien holder, was issued, without premium charge, as an endorsement to the U.S.F. & G. policy (Exhibit No. 3; Finding No. 3, R. 55).

On December 31, 1960, because of Lyon's failure to pay the premium, Heber J. Grant Co., the agent which wrote the policy for U.S.F. & G., sent a suspension notice to Lyon (Exhibit No. 13), and it was received by him (R. 127). Thereafter Lyon paid a portion of the premium but the amount was insufficient to maintain the policy in force and Lyon was so informed in telephone conver-

sations with representatives of Heber J. Grant Co. (R. 130; Finding R. 55).

On April 7, 1960, the Clerk in charge of policy cancellation at Heber J. Grant Co. prepared a Notice of Cancellation of the U.S.F. & G. policy and placed such notice and a duplicate thereof in separate envelopes addressed to Lyon and to plaintiff respectively, informing them that the policy would be formally cancelled after ten days had elapsed. Necessary postage was affixed to the envelopes together with a form of mailing certificate used by the U.S. Post Office Department, of which Exhibit No. 17 is an illustration. These envelopes after being stamped and sealed were handed to the mail clerk of Heber J. Grant Co., together with the mailing certificates. The established routine of the cancellation clerk required that before an insurance policy could later be cancelled, the cancellation clerk must determine that the envelope with the mailing certificate attached had been received for mailing at the Post Office, and that the mailing certificate had been receipted and returned by the post office official, and only when the certificate had been so processed by the Post Office and returned could the policy be formally cancelled (R. 199, 201). The U.S.F. & G. policy was formally cancelled by the cancellation clerk April 23, 1960, as a part of such established routine (R. 189-202; Finding No. 5, R. 55).

In the summer of 1960, Lyon went to work with the truck on a construction project in Arizona. He obtained insurance coverage for his truck under the fleet policy

maintained by the general contractor on the project. Upon his return to Utah in August, 1960, Lyon applied for, and obtained, insurance coverage on the truck with the defendant The Travelers Insurance Co., which issued its policy September 15, 1960 (Finding No. 7, R. 56; R. 130-131). This policy was issued in the name of Lyon but the loss payable clause attached to the policy mistakenly showed First Security Bank of Utah as lienholder, even though said bank had no interest in the truck or transactions concerning it (R. 132, 137, 139). Upon receipt of the policy, Lyon noticed this and other errors, took the policy to the Salt Lake City Office of Travelers and reported the mistakes. He was assured by Travelers that the mistakes would be corrected. The mistakes, however, were not corrected and at the time of the loss hereinafter referred to, the Travelers' policy was in full effect (R. 132-39).

On October 21, 1960, in Uintah County, Utah, Lyon intentionally set fire to the truck, causing its total destruction. On that date, and before destruction, the reasonable value of the truck was $6,500.00 (Finding No. 8, R. 56).

Lyon reported the loss to Travelers as an accidental loss but later admitted that he had intentionally destroyed the truck. He did not report the loss to U.S.F. & G. (R. 186).

At the trial of this case on December 19, 1961, before the close of plaintiff's evidence, plaintiff and defendant Travelers informed the court that negotiations between

those parties had resulted in a stipulation that plaintiff would dismiss its action as to Travelers in consideration of the payment that Travelers agreed to make, and plaintiff further stipulated that by reason of said payment, any judgment obtained against defendant U.S.F. & G. would be considered reduced by one-half and as to defendant Lyon, plaintiff agreed to give Lyon full credit for the full amount of any judgment which might be obtained against U.S.F. & G. (R. 173-75). As a result of the stipulation between plaintiff and Travelers, the court on January 5, 1962, entered its formal order, dismissing with prejudice the action as to Travelers (R. 33). Following the stipulation between plaintiff and Travelers, the trial proceeded as against the remaining defendants.

The trial resulted in a judgment in favor of U.S.F. & G. and against plaintiff, no cause of action. On February 2, 1962, the court signed Findings of Fact and Conclusions of Law and Judgment which had been prepared by counsel for plaintiff (R. 34-36, 40). On February 8, 1962, plaintiff moved for a new trial on the ground that "Under the Findings of Fact made by the Court, plaintiff is entitled as a matter of law, and under a proper interpretation of the written instruments, to a judgment in its favor." (R. 42).

Also, on February 8, 1962, defendant U.S.F. & G. served its Motion to Amend Findings of Fact, Conclusions of Law and Judgment and submitted to the court

with said motion its proposed Findings of Fact, Conclusions of Law and Judgment (R. 43-48).

On March 5, 1962, the court heard argument on the above motions of the parties and on March 15, 1962, advised respective counsel by letter that plaintiff's motion for new trial was denied, that the Findings of Fact, Conclusions of Law and Judgment theretofore filed were withdrawn and that defendant U.S.F. & G.'s Motion to Amend Findings of Fact, Conclusions of Law and Judgment was granted (R. 50-51). The Court requested counsel for defendant U.S.F. & G. to prepare the Findings of Facts and Conclusions of Law and Judgment along the lines of the instruments it had proposed to the court, with the exception that the reasonable value of the truck at the time of loss was found to be $6500.00 and the court made no finding as to reformation of the policy of insurance issued by Travelers. On March 29, 1962, the court signed Findings of Fact and Conclusions of Law and Judgment as prepared by counsel for defendant U.S.F. & G. pursuant to the court's instructions of March 15, 1962 (R. 53-57). The court concluded that the destruction of the truck was not "direct and accidental" within the meaning of those terms in the U.S.F. & G. policy, that the U.S.F. & G. policy was cancelled as to plaintiff's interest and not in effect at the time of the loss, and that plaintiff did not suffer damages as a result of any act or omission of defendant U.S.F. & G. From the judgment in favor of defendant U.S.F. & G., plaintiff has appealed to this Court.

## STATEMENT PRELIMINARY TO ARGUMENT

As shown by the pretrial order (R. 28), plaintiff urged two theories of action for recovery against U.S.F. & G. in the trial court.

It was first contended U.S.F. & G. was liable for "negligent failure . . . to give notice of cancellation," which negligence, it was claimed, prevented plaintiff from securing coverage against the loss.

Secondly, it was claimed the effort to effect cancellation of the policy was "nugatory" because plaintiff was not given notice of cancellation.

The first of these theories is not argued in plaintiff's brief and has apparently been abandoned in view of the fact that plaintiff's own evidence showed conclusively that two separate and distinct policies of insurance, with other companies, had been obtained after the cancellation date of the U.S.F. & G. policy.

The second theory—that the policy was not effectively cancelled as to plaintiff—is argued vigorously in its brief with copious citation of authorities. The general principles of law announced by the cited cases are not in dispute here, and defendant will not argue the sufficiency of the evidence to support the trial court's finding that plaintiff was "notified" of cancellation.

Argument on this point is unnecessary, since the issues believed to be determinative of the case, as hereinafter set forth, show that the Court need not reach the question of notification of cancellation.

## ARGUMENT

### POINT I. THE LOSS WAS NOT "DIRECT AND ACCIDENTAL" AND SO WAS NOT WITHIN THE COVERAGE OF THE POLICY ISSUED BY DEFENDANT U. S. F. & G.

Under the policy of insurance issued to Mark L. Lyon on December 19, 1959 (Exhibit 2), U.S.F. & G. agreed under "Coverage F" of the "Insuring Agreements," to

> "*pay for direct and accidental loss* of or damage to the automobile, hereinafter called loss, caused (a) by fire . . ." (Emphasis added.)

This clause defines in clear and simple terms, as to a particular hazard, the extent of the coverage afforded and the measure of the liability assumed by U.S.F. & G. under the policy. And, of course, only losses which come within the coverage definition would be compensable under the policy. 29-A Am. Jur. 289 (Ins. § 1135); 45 C.J.S. 616 (Ins. § 674); *U.S. Trust & Guaranty Co. vs. West Texas State Bank* (Tex. Civ. App. 1954), 272 S.W.2d 627. Thus only if the intentional destruction of the truck by Lyon in this case constitutes such a "direct and accidental" loss can it support a recovery under the policy.

In this connection, it may be noted that it is uniformly held that an intentional and wilful destruction of the insured property by, or at the instigation of, the insured does not constitute a "direct and accidental" loss within the meaning of the above clause, and hence is outside the coverage provided by such clause. *Lewis*

*vs. Audubon Ins. Co.* (La. 1953), 62 So.2d 850; *Fedele vs. National Liberty Ins. Co.* (Va. 1945), 35 S.E.2d 766; *Federal Ins. Co. vs. Wong* (D.S.D. Calif. 1956), 137 F.S. 232; *Bellman, et al., vs. Home Ins. Co., et al.,* (Wisc. 1922), 189 N.W. 1028; *Jones vs. Fidelity & Guaranty Ins. Co.* (Tex .....), 250 S.W.2d 281; *Hargrove vs. American Centennial Ins. Co.,* (10th Cir. 1942), 125 F.2d 225, 228; *Orient Ins. Co. vs. Cox* (Ark. 1951), 238 S.W.2d 757; *Klemens vs. Badger Mutual Ins. Co.* (Wisc. 1960), 99 N.W. 2d 865; *Federal Ins. Co., et al., vs Tamiami Trail Tours, Inc., et al.* (5th Cir. 1941), 117 F.2d 794, 796; *Chaachou vs. American Central Ins. Co.* (5th Cir., 1957), 241 F.2d 889; 29-A Am. Jur. 427 (Ins. § 1304); U.C.A., 1953 § 76-6-4.

In its brief plaintiff attempts to circumvent the effect of the above rule by noting that many authorities hold that under the type of loss payable or mortgage clause endorsed on the U.S.F. & G. policy, known as the Standard or Union clause, two separate and independent insuring contracts are effected; one between the insurer and the mortgagor and the other between the insurer and the mortgagee, and that the latter contract with the mortgagee is not necessarily invalidated by acts of the mortgagor even though such acts would clearly invalidate the contract with the mortgagor. From these authorities, with which this defendant does not take issue, plaintiff draws the unwarranted and erroneous conclusion that, as to its interest in the truck, the policy provided coverage against its intentional destruction by the defendant Lyon. Plaintiff erroneously concludes that a mortgagee

is protected against *all* losses resulting from acts of the mortgagor without regard to coverage provisions in the policy under which the loss is claimed. Obviously, such a position cannot be sustained.

This defendant readily concedes that the loss payable endorsement issued by it on January 8, 1960, is the Standard or Union clause and that, under the great weight of authority and as is seen from its language, it effects a separate contract with the mortgagee as to the "loss or damage, if any, *under the policy*" (Emphasis ours.) Further, it is conceded that the separate contract may not be invalidated by acts or omissions of the mortgagor even though such acts or omissions would clearly invalidate the policy with the mortgagor. This, however, is not to say that the separate contract with the mortgagee rewrites the insurance policy or enlarges it to include a kind of loss not insured against by the plain language of the coverage provisions of the policy.

As is stated in the leading case of *Travelers Ins. Co. vs. Springfield Fire & Marine Ins. Co.* (8th Cir. 1937), 89 F.2d 757, 761:

> "In order to determine what the contract between the insurer and the mortgagee is, reference must necessarily be had to both the mortgage clause and the policy of which it is made a part. To ascertain the property insured, *the hazard insured against*, the amount of the insurance, the duration of the contract, *the extent of the coverage, the terms of the coverage,* the date when the insurance takes effect, the conditions under which it will remain effective, and the amount of the

> premium, resort must be had to the policy. In other words, the policy fixes the quantity and quality of the insurance except insofar as it may be modified by the mortgage clause, and the general purpose of that clause is to make the insurance provided for in the policy payable to the mortgagee as its interests may appear." (Emphasis added.) See also, U.C.A., 1953 § 31-19-36(1).

This rule is not in conflict with the authorities cited by plaintiff as can be seen from the quotation, at page 29 of its brief, from 5 Appleman, Insurance § 3401 at 560, to the effect that "the policy terms themselves are not nullified by a standard mortgage clause . . . but rather, . . . a new contract *containing those* (*policy*) *provisions* is made with the mortgagee personally." (Emphasis added.) Also, it will be noted that *Piedmont Fire Ins. Co. v. Fidelity Mortgage Co.* (Ala. 1948) 35 So. 2d 352, cited by plaintiff as support for his contention, states as follows at page 354 of the opinion:

> "We readily agree with counsel for appellant that if the loss was not within the coverage of policy contract, it cannot be brought within that coverage by invoking the principle of waiver or estoppel. . . . No one, we would assume, would agree that a policy of insurance which protected one against loss by fire, could be extended or broadened, by application of the principle of waiver or estoppel, to cover a loss by cyclone. The effect in such a case, would be to create a new contract, without a new consideration."

Since, as noted above, an intentional destruction of the insured property does not constitute a "direct and

accidental'' loss, it is clear that the loss in this case was not covered by, and hence is not compensable under the U.S.F. & G. policy. None of the authorities cited in plaintiff's brief will support a different conclusion. They involve losses that were clearly covered by and were clearly within the plain language of the insuring agreement of the policy, and the question was whether the breach of a policy ''condition'' by the mortgagor would invalidate the policy as to the mortgagee. Obviously such is not the situation in the present case where the question is simply one of ''coverage'' under the policy.

In *U.S. Trust & Guaranty Co. vs. West Texas State Bank* (Tex. Civ. App. 1954), 272 S.W. 2d 627, a policy of insurance naming the bank as loss payee, under a Standard or Union mortgage clause, was issued to the owner of an automobile, insuring loss sustained "While the automobile is within the United States of America, its Territories or Possessions, Canada or Newfoundland." The automobile was damaged while being driven in Mexico by the named insured. The mortgagee bank there contended, as does the plaintiff in this case, at page 628, as follows:

> "Appellee (bank) contends that the purpose of the endorsement was to protect the mortgagee bank from the act of the mortgagor in taking the automobile into Mexico. The bank says that said endorsement makes a new and independent contract between it and the insurer and its validity is dependent solely on the acts of the mortgagee, unaffected by any act or neglect of the mortgagor in violation of the 'conditions' of the policy. . . .

> We think *said endorsement does not grant additional coverage* under the policy *to anyone* and that the unambiguous provision that the policy covers only accidents which occur 'while the automobile is in the United States . . . ' excludes coverage of accidents which occur outside said territorial limits." (Emphasis added.)

The Court concluded at 629:

> "We recognize that the clause making the loss payable to the mortgagee regardless of any act or neglect of the mortgagor, permits the mortgagee's recovery despite any violation of a 'condition' by the mortgagor unknown to the mortgagee. . . . The question here is not relative to such a matter. The question is whether the accident that damaged the auto was covered by the policy. The plain, unambiguous language of the policy compels the conclusion that while the auto was without the territory covered by the policy there was no coverage under the policy. This was not a condition the breaking of which by the mortgagor was, according to the contract, not to affect the rights of the innocent mortgagee. The policy simply provided that there was no insurance while the car was without the territory stated. . . . The bank's claim . . . was not covered by the policy."

Another case, almost identical on its facts to the *U.S. Trust* case, *supra*, *Southwestern Funding Corp. v. Motors Ins. Corp.* (Calif. D.C.A. 1962), 22 Cal. Reptr. 781, reached the same conclusion that policy "coverage" was the same under the payable clause and under the policy itself and that the mortgage would not be protected against losses outside that policy coverage.

In a final attempts to evade the effect of the rules set forth above, plaintiff points to the provision in the loss payable endorsement which specifically excludes from coverage as to the mortgagee, losses caused by the "conversion, embezzlement or secretion" of the insured property by the insured, and concludes that, since arson of the insured property by the insured is not also listed among those exclusions, it is necessarily covered along with all other imaginable losses caused by acts of the insured which are not expressly excluded. To sustain this contention would indeed be to "extend" the policy coverage "without a new consideration" in disregard of the "plain, unambiguous language" of the policy coverage provisions.

The purpose of adding, to the loss payable endorsement, the clause specifically excepting from coverage conversion, embezzlement or secretion by the insured becomes readily apparent upon close examination of the policy provisions, particularly when it is remembered that the policy and its endorsement are "standard forms" designed so they may be used for numerous and varied kinds of risks and coverages. The clause was simply added to exclude from coverage these specific risks which would be otherwise covered, if a premium were paid for insurance, under "coverage G," wherein the company agrees:

> "To pay for loss of or damage to the automobile, hereinafter called loss, caused by theft, larceny, robbery or pilferage." (Exhibit No. 2)

It will be noted that the phrase "direct and accidental" does not qualify this coverage provision as it qualifies the coverage provided under Coverage D (covering losses from other than collision or upset), Coverage E (covering collision or upset), Coverage F (covering fire, lightning and transportation), and Coverage H (providing combined additional coverage). Only the insurance under Coverage F is involved in this case.

It is obvious that without the loss payable provision, excluding coverage of those specific acts of the insured, the company would be responsible, under Coverage G to a mortgagee since there is no "direct and accidental" limitation on such coverage. The fact that such losses resulted from wilful acts of the insured, while providing a valid defense to any claim by the insured, would not invalidate such coverage as to the mortgagee.

The addition of these specific exclusions to the loss payable endorsement, however, in no way affects the rules stated above, which compel the conclusion that the loss in this case does not fall within the coverage provided in the U.S.F. & G. policy. The cause of the loss in the present case, *viz,* loss through arson by the named insured, is specifically dealt with and excluded from coverage by the "direct and accidental" limitation of Coverage F, as that phrase has been uniformly interpreted in the many cases cited at p. 9 of this brief. Thus, it would have been a useless and redundant gesture to put a further such exclusion in the loss payable endorsement applicable to this case.

The above interpretation of the policy and loss payable clause as one whole, unified instrument gives meaning to all clauses and provisions without importing into the policy the unnecessary and unwarranted ambiguity, uncertainty and contradiction which would necessarily result from the strained construction urged by the plaintiff. The construction urged by the plaintiff would, of necessity, create an inconsistency between the provisions of Coverage F, which exclude coverage, and the provisions of the loss payable clause which, in plaintiff's view, would provide coverage. Such a construction is contrary to the clearly indicated meaning of the policy and loss payable clause provisions as outlined above.

POINT II. PLAINTIFF IS BARRED FROM A RECOVERY AGAINST THIS DEFENDANT BECAUSE, BY ITS DISMISSAL OF THIS ACTION AS TO DEFENDANT TRAVELERS, IT HAS IMPAIRED THIS DEFENDANT'S SUBROGATION RIGHTS.

In the event it were held that plaintiff was entitled to recover under the U.S.F. & G. policy, U.S.F. & G. would, upon payment to plaintiff of the amount of the loss, be subrogated to the claim of plaintiff against defendant Travelers. *Labonte vs. St. Paul Fire & Marine Ins. Co.* (N.H. 1936), 186 Atl. 6, *Papandrou vs. Caledonian Ins. Co.* (N.H. 1940), 13 A.2d 735; *Zeiger vs. Farmers and Laborers Coop. Ins. Ass'n.* (Mo. 1948), 215 S.W.2d 426: 6 Appleman, Insurance, Section 4074 at p. 565.

In the *Labonte* case, the plaintiff obtained a policy of insurance covering real property which contained a

loss payable clause in favor of two mortgagees. Plaintiff lost the policy of insurance and so obtained a new policy from Phoenix Ins. Co. which failed to mention the mortgage interests. Plaintiff then directed the St. Paul agent to cancel the first policy, but, through some error, St. Paul failed to notify the mortgagees.

The property was destroyed by fire and plaintiff sued both insurance companies to recover the loss. The trial court found that the St. Paul policy had been cancelled as to plaintiff, but effective as to the mortgagees. Accordingly it ordered St. Paul to pay all interest of the mortgagees and Phoenix to pay the interest of plaintiff.

On appeal, the issue was "whether the Phoenix policy was valid; and, if so, whether the total coverage should be paid solely by the Phoenix Company or be distributed between the two companies" as ordered by the court.

The court first noted that the situation between St. Paul and the mortgagees was the same as though the mortgagees had obtained the policy themselves and that St. Paul, upon payment of the loss, would be subrogated to the claims of the mortgagees as a matter of law. The court's holding is stated thus in 6 Appleman, Insurance Section 4074, at page 565, n. 64:

> "Where mortgagor, who had cancelled fire policy without consent of mortgagees and had taken out policy in another company, brought equitable action against both insurers to determine which policy was in force, original insurer,

> which was still liable to mortgagees and entitled thereby to subrogation, could require second insurer, liable for full amount of loss, to pay mortgagee's interest directly to avoid circuity of action."

In accepting a settlement from Travelers and voluntarily dismissing this action as to Travelers, plaintiff thereby relinquished all claims which it could otherwise have asserted against Travelers in connection with this particular loss. By so doing, it has deprived this defendant of the subrogation right it would otherwise have had to recover from Travelers the amount of any payment made by it to plaintiff. This impairment of this defendant's rights is in violation of the loss payable provision which states:

> "Whenever the Company shall pay the lienholder any sums for loss or damage under the policy and shall claim that, as to the Lessee, Mortgagor or Owner, no liability therefor existed, the company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made. . ."

It is well established than an insured is barred from recovering against its insurer where it has destroyed the insurer's subrogation rights against other parties. 6 Appleman, Insurance, Section 4093 at p. 587, and Section 4074 at page 565 n. 60; *Home Ins. Co. of N.Y. v. Young* (Tex. 1936), 97 S.W. 2d 360.

## CONCLUSION

It is clear that arson of the insured property by the named insured did not bring about a "direct and accidental" loss as that phrase has been repeatedly interpreted by the courts. No case which would contradict that rule has been brought to our attention. And, the validity of this proposition cannot be confined to the contract with the mortgagor, as plaintiff urges, for the reason that the terms and conditions of the contract with the mortgagee must be determined by reference to the policy of which the loss payable endorsement is a part. Clearly, the contract with the mortgagee provides the same "direct and accidental" limitation as is provided in the policy itself. Thus, the contract with the mortgagee does not provide unlimited protection against *all* acts of the mortgagor, as claimed by plaintiff, but only against those risks and hazards which come within the coverage provided for in the policy itself. The loss payable clause does not enlarge or stretch the policy nor do risks, which are otherwise uninsurable, suddenly become covered without premium charge or consent of the insurer. None of the cases and authorities cited by plaintiff contradict these rules of law.

The fact that the loss payable endorsement specifically excludes conversion, embezzlement and secretion by the named insured without also mentioning arson does not affect the result indicated above. These specific exclusions were added to the loss payable clause to limit the company's liability as to risks which otherwise would

clearly fall within the coverage provided in Coverage G, since that clause is not qualified by any "direct and accidental" limitation.

Even if it were held that plaintiff could recover under the U.S.F. & G. policy, plaintiff has forfeited its right to such recovery by the fact that it has destroyed this defendant's subrogation rights against the defendant Travelers. Both the right of the insurer to be subrogated to the claims of the mortgagee against third parties, and the effect of an impairment of that right by the mortgagee, are supported by the authorities which have considered this question.

Plaintiff on appeal has the burden of showing that the trial court erred and that, except for such error, a different result would have been reached.

Plaintiff has failed to sustain this burden. Instead, the record and the law clearly show plaintiff is not entitled to recover against defendant. The trial court so found and its judgment should be affirmed.

Respectfully submitted,

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